

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARTIN O'DONNELL, an individual,

Plaintiff,

v.

BUNGIE, INC., a Delaware corporation,
and HAROLD RYAN, an individual,

Defendants.

No. 14-2-19913-9 SEA

ORDER CONFIRMING PARTIAL
FINAL ARBITRATION AWARD

~~PROPOSED~~

CLERK'S ACTION REQUIRED

Pending before the Court is Plaintiff Martin O'Donnell's Renewed Motion to Confirm Partial Final Arbitration Award (the "Motion"). In connection with the Motion, the Court has reviewed the following materials:

1. Plaintiff Martin O'Donnell's Renewed Motion to Confirm and Enforce Partial Final Arbitration Award;
2. Supplemental Declaration of Timothy B. Fitzgerald in Support of Plaintiff Martin O'Donnell's Renewed Motion to Confirm and Enforce Partial Final Arbitration Award;
3. Defendants' Response _____;
4. Plaintiff's Reply _____; and
5. _____.

The Court has also reviewed the records and files herein. And being otherwise fully advised in this matter, now, therefore, HEREBY ORDERS, ADJUDGES, AND DECREES as follows:

1 A. The Court has jurisdiction over this matter pursuant to the Amended
2 Services Agreement between O'Donnell and Bungie, Inc. dated as of December 31, 2010
3 (the "Amended Services Agreement") and RCW 7.04A.260(2).
4

5 B. Venue is proper in this Court pursuant to the Amended Services Agreement
6 and RCW 7.04A.270.


7 C. The partial final arbitration award entered on July 18, 2014 in favor of
8 Plaintiff O'Donnell and against Defendants Bungie, Inc. and Harold Ryan ("Defendants"),
9 which is attached as **Exhibit A** (the "Partial Final Award") and incorporated by reference
10 as if fully set forth herein, is hereby CONFIRMED.

11 D. Defendants are obligated to comply with Partial Final Award in every
12 respect.

13 E. O'Donnell may enforce the Partial Final Award through all available rights
14 and remedies, including through a motion for contempt of court.

15 F. This Court shall retain jurisdiction to enforce the Partial Final Award for so
16 long as it remains in effect.

17 DONE this 11^m day of August, 2014.

18 
19 _____
King County Superior Court Judge

20 PRESENTED BY:

21 McNAUL EBEL NAWROT & HELGREN PLLC

22 s/ Timothy B. Fitzgerald
23 Timothy Fitzgerald
24 600 University Street, Suite 2700
25 Seattle, WA 98101
26 Telephone: (206) 467-1816
Fax: (206) 624-5128
Attorneys for Plaintiff

Exhibit A

JAMS ARBITRATION

MARTIN O'DONNELL,

Claimant,

v.

BUNGIE, INC. and HAROLD RYAN,

Respondents.

No. 1160019992

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
PRELIMINARY INJUNCTION,
AND PARTIAL FINAL AWARD**

This matter is before the Arbitrator on Claimant Martin O'Donnell's ("O'Donnell") Motion for Preliminary Injunction against Respondents Bungie, Inc. ("Bungie") and Harold Ryan (Bungie and Ryan are collectively referred to as Respondents"). This document constitutes the Arbitrator's findings of fact, conclusions of law, preliminary injunction, and partial final award pursuant to Rule 24(e) of the JAMS Employment Arbitration Rules & Procedures.

In making its decisions, the Arbitrator has considered the following:

1. Claimant Martin O'Donnell's Motion for Preliminary Injunction;
2. Declaration of Timothy B. Fitzgerald in Support of Motion for Preliminary Injunction, with exhibits;
3. Declaration of Martin O'Donnell in Support of Motion for Preliminary Injunction;
4. Respondents' Opposition to Claimant's Motion for Preliminary Injunction;

1 5. Declaration of Laura M. Merritt in Support of Respondents' Opposition to
2 Claimant's Motion for Preliminary Injunction, with exhibit;

3 6. Declaration of Ondraus Jenkins in Support of Respondents' Opposition to
4 Claimant's Motion for Preliminary Injunction, with exhibits;

5 7. Claimant Martin O'Donnell's Reply in Further Support of Motion for
6 Preliminary Injunction;

7 8. Supplemental Declaration of Timothy B. Fitzgerald in Support of Claimant
8 Martin O'Donnell's Motion for Preliminary Injunction, with exhibits;

9 9. Supplemental Declaration of Martin O'Donnell in Support of Motion for
10 Preliminary Injunction;

11 10. Letter of July 17, 2014 from Timothy R. Fitzgerald;

12 11. Letter of July 18, 2014 from Laura m. Merritt; and

13 12. The records and files herein.

14 The Arbitrator also heard oral argument of the parties on July 16, 2014.

15 The Arbitrator deems this tribunal fully advised and issues the following findings of fact
16 conclusion of law, order and Partial Final Award, as follows:

17 **I. FINDINGS OF FACT**

18 The Arbitrator finds that O'Donnell has demonstrated a substantial likelihood of
19 successfully proving the following facts during the final hearing in this matter:

20 1. JAMS has jurisdiction over all parties hereto and venue is proper.

21 2. O'Donnell is one of seven founders of Bungie, LLC, later Bungie, Inc..

22 Between 2000 and 2014, O'Donnell served as Bungie's Audio Director.

23 3. Prior to its conversion into a corporation, Bungie, was a limited liability
24 company originally named Arete Seven, LLC, later re-named Bungie, LLC. In October
25 2007, O'Donnell was issued 1,271.43 Class B Membership Interests in Bungie, LLC. In
26 December 2010, in connection with the conversion of Bungie, LLC into the corporation

1 that it is today, O'Donnell's Membership Units were converted into 336,375 shares of
2 Bungie's Series B-1 Preferred Stock. In addition, in December 2010 O'Donnell was
3 issued 48,000 shares of Bungie's Common Stock.

4 4. On December 31, 2010, O'Donnell entered into an Amended Services
5 Agreement with Bungie. The Amended Services Agreement provides that Bungie
6 employed O'Donnell, and O'Donnell accepted such employment, for a term of
7 employment ending on April 21, 2017, subject to automatic extension through April 21,
8 2020 unless written notice of non-extension were provided by either party on or before
9 March 22, 2017.

10 5. The Amended Services Agreement provides that unvested portions of
11 O'Donnell's Founders' Shares would be forfeited and automatically transferred to and
12 reacquired by Bungie in the event O'Donnell chose to voluntarily terminate his service as
13 a Service Provider (as that term is defined in the Amended Services Agreement).

14 6. As of April 16, 2010, Bungie and Activision Publishing, Inc. entered into a
15 Software Publishing and Development Agreement, pursuant to which Bungie was to
16 produce a five-part videogame franchise to be called *Destiny*. Prior to
17 September 24, 2013, the agreed-upon anticipated release date of *Destiny*, Mr. O'Donnell
18 composed music for "every application of" the *Destiny* franchise. Bungie decided not to
19 release the game in accordance with the agreed-upon anticipated release date.

20 7. Bungie terminated O'Donnell's employment without cause on
21 April 11, 2014. Bungie took actions to immediately forfeit O'Donnell's shares. The
22 forfeiture effectively stripped O'Donnell of all rights that he would have enjoyed as a
23 holder of shares.

24 8. O'Donnell believes that Bungie's release of *Destiny* is imminent. Release
25 of *Destiny* is relevant to the vesting of Bungie shares.
26

1 9. During the preliminary hearing in this matter, conducted on July 1, 2014,
2 counsel and the arbitrator discussed the status of O'Donnell's shares. The arbitrator gave
3 Claimant permission to file a motion for preliminary injunction if the parties could not
4 agree to protect the status of the shares pending the arbitration hearing.

5 10. On July 1, 2014, the Bungie stockholders (excluding O'Donnell, who was
6 not given notice of the vote because Bungie forfeited his shares) elected to convert all
7 outstanding shares of Series B-1 Preferred Stock and Series B-2 Preferred Stock into
8 Common Stock, effective at 12:01 a.m. Pacific Time on July 1, 2014.

9 11. O'Donnell filed his motion for preliminary injunction on July 7, 2014
10 seeking "entry of a preliminary injunction requiring Respondents to place his shares with
11 an independent escrow agent, to be maintained in his name, pending final resolution of
12 this action."

13 12. On July 16, 2014, the arbitrator conducted a hearing regarding the Motion.
14 The arbitrator granted the motion for preliminary injunction and ruled that it would be
15 effective immediately.

16 13. If Claimant prevails in the arbitration, he cannot be made whole by a mere
17 award of monetary damages. Nor will a reissuance of shares at the end of these
18 proceedings guarantee that his interests have not been impaired by use of the shares for
19 Bungie's business purposes in the interim. O'Donnell will also have suffered irreparable
20 loss of his shareholder rights during the pendency of this action unless his shareholder
21 rights are restored pending the arbitration hearing.

22 14. Respondents have argued that if Claimant's shares are restored, Claimant
23 will be a bothersome presence at board meetings and in the company. They also argue
24 that they may wish to use the shares for some other, unspecified business purpose before
25 the arbitration hearing. These harms are greatly outweighed by the harm to Claimant if
26

1 preliminary relief is not granted. Additionally, a protective order can protect Respondents
2 from Claimant's alleged inappropriate behavior.

3 15. The circumstances described in these findings, together with other
4 evidence in the record, demonstrate a significant likelihood that, absent entry of a
5 preliminary injunction, Claimant may suffer additional harm to his shareholder rights for
6 which there is no adequate legal remedy.
7

8 CONCLUSIONS OF LAW

9

10 Pursuant to the foregoing Findings of Fact, the arbitrator enters the following Conclusions
11 of Law:

12 1. O'Donnell has established a substantial likelihood he will prove at the
13 arbitration hearing that he has a clear legal or equitable right to ownership of shares in
14 Bungie, Inc.

15 2. O'Donnell has established he has a well-grounded fear of immediate
16 invasion of his shareholder rights by Respondents.

17 3. O'Donnell has established a substantial likelihood that he will have
18 suffered actual and substantial injury, and will suffer irreparable harm if the Arbitrator
19 does not order Respondents to restore O'Donnell's shares to the *status quo ante* pending
20 the arbitration hearing. *Status quo ante* means the "last actual, peaceable, non-contested
21 condition which preceded the pending controversy." *Gen. Tel. Co. of the Nw, Inc. v.*
22 *Wash. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 466 (1985). Here, restoration of the
23 *status quo ante* requires Respondents to restore to O'Donnell the shares that he held on
24 April 10, 2014, the day prior to Bungie's termination of his employment.
25
26

1 4. O'Donnell is required to post a bond in the amount of \$5,000.00 to secure
2 costs and damages that may be sustained by Respondents if Respondents are wrongfully
3 enjoined.

4 **II. PRELIMINARY INJUNCTION AND PARTIAL FINAL AWARD**

5 **NOW THEREFORE, IT IS ORDERED AND AWARDED:**

6 1. O'Donnell's Motion for Preliminary Injunction is GRANTED.

7 2. Within seven (7) days of the date of this order, Respondents shall take all
8 steps necessary and shall issue to O'Donnell the shares he owned on April 10, 2014,
9 together with any dividends, distributions or other proceeds that may have been
10 distributed between April 10, 2014 and the date of this order. If Bungie cannot legally
11 issue shares of B-1 Preferred Stock, it shall issue the equivalent value of Common Shares,
12 in the same manner other owners of B-1 Preferred Stock received Common Stock.
13 Bungie shall cause the shares to be immediately deposited, for the benefit of O'Donnell,
14 with an escrow agent of O'Donnell's choosing.

15 3. Until the arbitration hearing in this matter is concluded and a Final Award
16 is issued, or unless otherwise instructed by the arbitrator, these shares shall be maintained
17 by the escrow agent in the name of O'Donnell and for the sole and exclusive benefit of
18 O'Donnell.

19 4. Respondent Bungie shall provide all notices and communications to
20 O'Donnell as may be required under the company's charter, bylaws, and applicable law
21 regarding his ownership of the shares. Respondents shall otherwise take no action to
22 impair, circumvent, or frustrate O'Donnell's rights as a shareholder of Bungie, provided
23 that the parties may agree to a protective order as described above.

24 5. Within seven (7) days of the date of this order, O'Donnell shall post a bond
25 for the benefit of Bungie in the amount of \$5,000.00. O'Donnell shall provide proof of
26 that bond to Respondents and the arbitrator within one business day of its issuance.

6. This Preliminary Injunction and Partial Final Award is binding on Respondents, their agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

7. This Award is issued as a Partial Final Award (rather than a Partial Interim Award) so that O'Donnell may enforce this Preliminary Injunction and Partial Final Award, or any portion of it, in the King County Superior Court located in Seattle, Washington, if he chooses to do so.

8. This Preliminary Injunction expires on entry of the Final Award and shall have no further force and effect. Nothing in this Award prevents the arbitrator from making different findings of fact and conclusions of law in a Final Award to be issued after the arbitration hearing.

9. The issue of attorneys fees is reserved to a final decision on the merits, to be addressed in the Final Award.

DATED this 18th day of July, 2014, *nunc pro tunc* July 16, 2014 at Seattle,
Washington.

Sharon S. Armstrong
JUDGE SHARON S. ARMSTRONG (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: O'Donnell, Martin vs. Bungie, Inc, et al
Reference No. 1160019992

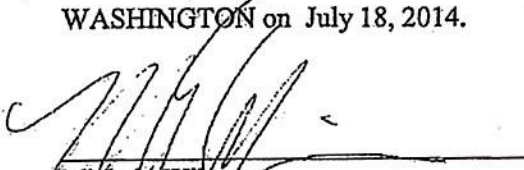
I, Michele Wilson, not a party to the within action, hereby declare that on July 18, 2014 I served the attached Findings of Fact, Conclusions of Law, Preliminary Injunction and Partial Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Seattle, WASHINGTON, addressed as follows:

Timothy B. Fitzgerald Esq.
McNaul Ebel Nawrot, et al.
600 University St.
Suite 2700
Seattle, WA 98101
Phone: 206-467-1816
tfitzgerald@mcnaul.com
Parties Represented:
Martin O'Donnell

Laura M. Merritt Esq.
Wilson Sonsini Goodrich & Rosati
900 S. Capital of Texas Hwy
Las Cimas IV, Fifth Floor
Austin, TX 78746
Phone: 512-338-5400
lmerritt@wsgr.com
Parties Represented:
Bungie, Inc.
Harold Ryan

I declare under penalty of perjury the foregoing to be true and correct. Executed at Seattle,

WASHINGTON on July 18, 2014.


Michele Wilson
mwilson@jamsadr.com